UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Central Maine Power Company	**)**	**Docket No. EL08-74-000**

MOTION FOR LEAVE TO ANSWER CENTRAL MAINE POWER COMPANY'S ANSWER TO PROTEST AND ANSWER OF MAINE PUBLIC UTILITIES COMMISSION

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"), the Maine Public Utilities Commission ("MPUC") respectfully seeks leave to answer the Central Maine Power Company's ("CMP") August 18, 2008 Motion for Leave to Answer and Answer ("August 18 Filing") to the August 1, 2008 Joint Motion to Hold Petition in Abeyance and Protest filed by the MPUC, the Maine Office of Public Advocate ("OPA"), and the New England Conference of Public Utilities Commissioners, Inc. ("NECPUC") (collectively, "State Parties"). The MPUC respectfully requests that the Commission permit the instant answer because it is necessary to clarify outstanding and unresolved issues raised by CMP's August 18 Filing.

I. MOTION FOR LEAVE TO ANSWER OF THE MPUC

Although the Commission's regulations normally do not permit the filing of an answer to an answer,[1] the Commission has the authority to waive this prohibition for "good cause."[2] The Commission has found "good cause" to permit answers when they are otherwise prohibited in various circumstances, including when the answer would ensure a complete record in the proceeding,[3] provide information helpful to the disposition of an

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1 18 C.F.R. § 385.213(a)(2) (2008).

2 *See id.* §§ 385.101(e), 385.213(a)(2).

3 *See, e.g.*, *Pac. Interstate Transmission Co.*, 85 FERC ¶ 61,378 at p. 62,443 (1998), *reh'g denied*, 89 FERC ¶ 61,246 (1999); *Delmarva Power & Light Co*., 93 FERC ¶ 61,098 at p. 61,259 (2000) (allowing answers

issue,[4] permit the issues to be narrowed or clarified,[5] or aid the Commission in understanding and resolving issues.[6]

In the present case, this brief answer in response to CMP's answer to the State Parties' protest will ensure a more complete record in this proceeding and otherwise assist the Commission in understanding and resolving outstanding issues in the case. Therefore, the MPUC has shown "good cause" to submit the instant answer and respectfully requests that the Commission accept and consider the same.

II. ANSWER OF THE MPUC

A. CMP's Answer Illustrates Why the Commission Should Defer Consideration of the Petition for Declaratory Order for an Incentive ROE.

In its August 18 Filing answering the State Parties' Motion to Hold CMP's Petition for Declaratory Order in Abeyance, CMP asserts that a FERC determination on the requested incentives for its Maine Power Reliability Program ("MPRP" or "Project") "will not 'prejudge' the state proceeding in any way,"[7] but it then asserts that, during the regional system plan process, the State Parties did not raise any objection to the final study results.[8] CMP misses the point raised by the State Parties in their pleading. It is in the *state*

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to a protest in order to "insure a complete and accurate record"); *N. Natural Gas Co.*, 91 FERC ¶ 61,212 at p. 61,767 (2000) (allowing an answer to a protest "to achieve a complete and accurate record").

4 *See, e.g.*, *CNG Transmission Corp.*, 89 FERC ¶ 61,100 at p. 61,287 n.11 (1999).

5 *See, e.g.*, *PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,224 at p. 62,078 (1998); *New Energy Ventures, Inc. v. S. Cal. Edison Co.*, 82 FERC ¶ 61,335 at p. 62,323 n.1 (1998).

6 *See, e.g.*, *Carolina Power & Light Co.*, 94 FERC ¶ 61,032 at p. 61,068 (2000) (allowing an answer to protests when the answer would assist in the Commission's "understanding and resolution of the issues raised"); *El Paso Natural Gas Co.*, 56 FERC ¶ 61,038 at p. 61,139 (1991) (explaining that the utility conceded "that the Commission in its discretion may accept an answer to a request for rehearing in order to have a more complete record on which to base its decision," and allowing the answer because it "will not delay the proceeding or otherwise prejudice any party"). To the extent necessary, the MPUC requests waiver of Rule 213(a)(2).

7 *See* August 18 Filing at 18.

8 *Id.* at 19.

proceeding that the Project will be vetted by the state siting authority, not the regional process. In fact, it would have been inappropriate for the MPUC staff to *object* to the proposal during the Regional System Plan ("RSP") planning process conducted by the Independent System Operator of New England when the Project would eventually be before the Commission in a Certificate of Public Convenience and Necessity ("CPCN") proceeding. Thus, by suggesting that somehow the MPUC should have addressed concerns in the RSP planning process that might later be raised in the CPCN case, CMP appears to suggest that FERC disregard in advance any determinations made by the state in the CPCN proceeding. This is inconsistent with FERC's own comments about the interaction of state and federal jurisdiction:

> With regard to state review, the Commission recognizes that incentives for many utilities are incorporated into rates that must receive state commission approval and that many decisions on siting and permitting of new facilities are under the jurisdiction of state and local government authorities. Because of this, we will carefully consider the views of any state bodies having jurisdiction over these matters.

Order No. 679 at P 54.

CMP also asserts that "[t]here would be no need for FERC to revisit the Petition if the CPCN is issued after the order authorizing incentives is granted." August 18 Filing at 18. CMP, however, fails to consider two possible outcomes of the CPCN proceeding: (1) a CPCN will not be granted for the Project or (2) a CPCN is granted but the Project is modified through the CPCN process. In either of these two possible outcomes, FERC would need to reconsider whether any incentives proposed should be revoked or modified.

B. Contrary to CMP's Assertion, the Correct Economic Valuation of Any ROE Should Be Determined by Using Monthly Yields on Ten-Year Constant Maturity Bond Data Through the United States Treasury.

CMP claims that the MPUC's challenge to its calculation of an enhanced ROE incentive adder is an impermissible collateral attack on Opinion No. 489 and should be ignored. This argument is without merit.

The Commission has long recognized that neither *res judicata* nor collateral estoppel will "bar litigation of the justness and reasonableness of rates based on new facts (i.e., new economic data) or arguments, as is the case here, tending to show that the rates, even though previously adjudged to be just and reasonable, may no longer be just and reasonable." *See San Diego Gas & Elec. Co. v. Pub. Serv. Co. of N.M.*, 86 FERC ¶ 61,253, at 61,912 (1999). Therefore, for the reasons previously set forth in the State Parties' protest dated August 1, 2008 and the attached Affidavit of Rich Kivela thereto, CMP's requested adder must be recalculated to reflect "changed economic conditions." Affidavit of Richard S. Kivela at 19 ("Kivela Affidavit").

CMP's answer to the State Parties' protest also asserts that the State Parties' calculation of an ROE based on the United States Treasury bond data is somehow "misleading" and that the United States Treasury Bond data is not a relevant measure for CMP. August 18 Filing at 16. This argument is also without merit. In Opinion No. 489, the Commission recognized the long-established principle that "monthly yields on ten-year constant maturity U.S. Treasury Bonds provide a good indicator of these trends."[9] On rehearing of its Opinion No. 489, the Commission reaffirmed this principle while citing to various cases in which United States Treasury Bond rates were the benchmark:

[9] *See Bangor Hydro-Electric Co.*, Opinion No. 489, 117 FERC ¶ 61,129, at P 28 & n.61 (2006).

> However, the Commission has long endorsed the use of ten-year, constant maturity U.S. Treasury bonds as a good financial indicator of trends in market costs of capital and has therefore consistently used these Treasury bond rates to adjust an allowed ROE, subject only to the requirement that the adjustment fall within the zone of reasonable returns indicated by the applicable DCF analysis and then a finding under Federal Power Act (FPA) section 205 that the resulting rate is not unjust or unreasonable.[10]

Given the above authority, any enhanced ROE should reflect changes due to updated bond data from the United States Treasury.

C. Nothing in CMP's Answer Changes its Testimony, Which Establishes that ROE Adders Are Unnecessary.

CMP asserts in its answer that it needs both CWIP and the ROE adder and relies on *Boston Edison Co.*[11] to support its proposition that the Commission has previously recognized that CWIP is only a "modest offset to the bias against the new investment." August 18 Filing at 14. *Boston Edison*, however, does not support CMP's argument. In *Boston Edison*, the utility sought to recover only 50 percent of CWIP for a transmission upgrade in rate base. Here, of course, the CWIP incentive sought is for 100 percent rather than 50 percent. More importantly, in their protest, the State Parties argued that, on the basis of CMP's own testimony, if incentives were appropriate (and State Parties argued that they were not), the *100 percent* CWIP incentive, as well as the recovery of prudently incurred costs of abandonment, when coupled with the generous ROE already granted fully address the risks of the Project.

In fact, the Petition in Docket No. EL08-77 makes clear that CMP is financially capable of defraying MPRP Project costs and obtaining investment capital without any

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[10] *Bangor Hydro-Electric Co.*, 122 FERC ¶ 61,265 (2008) (citing *System Energy Resources, Inc.*, 92 FERC ¶ 61,119, at 61,447 (2000); *Ne. Utils. Serv. Co.*, 83 FERC ¶ 61,184 at 61,765, *reh'g denied*, 84 FERC ¶ 61,159 (1998); and *Orange & Rockland Utils., Inc.*, 45 FERC ¶ 61,252, at 61,753 (1988)).

[11] *Boston Edison Co.*, 109 FERC ¶ 61,300 (2004).

enhanced ROE. In its Petition for Declaratory Order seeking incentive rates for the Maine Power Connection Project ("MPC"), a transmission project to which CMP is a joint filer and which has anticipated costs of $625 million,[12] CMP described its cash flow and access to capital as "very strong," stating:

> Although the [MPC] requires substantial up-front outlays of cash, CMP's current financial position does not absolutely necessitate that it request CWIP for this Project. *CMP has sufficient cash flow, a reasonable balance sheet, and adequate access to capital that can withstand construction costs for the Project prior to its in-service date. CMP's current credit ratings are strong, and CMP anticipates that it will not experience cash flow issues that would require the recovery of CWIP and pre-commercial operating expenses*.[13]

Based on its own characterization, in Docket No. EL08-77, CMP has strong credit ratings, sufficient cash flow, and a reasonable balance sheet. Further, nothing raised in CMP's answer addresses the State Parties' claim that, by virtue of CMP's own testimony in this Docket, CMP does not require the ROE adder.

D. CMP Does Not Have a "Right" to an Incentive Adder.

CMP asserts that the Commission should not consider whether a formula rate reduces risk and therefore eliminates or reduces the need for any incentive rate treatment. In so arguing, CMP states that the New England Transmission Owners "did not 'trade away' *their right* to incentive adders in order to receive any benefits they may receive from a formula rate." August 18 Filing at 14 (emphasis added). CMP's statement misapprehends the purpose of section 219 of the Federal Power Act ("FPA"). Nothing in section 219 or in the Commission's rulemaking on incentive rate treatments established a "right" to an enhanced ROE. In fact, the opposite is true, section 219 maintains the requirement that any rate

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[12] See Me. Pub. Serv. Co. and Cent. Me. Power Co., *Petition for Declaratory Order Authorizing Incentive Rates for Central Maine Power Company and Maine Public Service Company for the Maine Power connection Project*, FERC Docket No. EL08-77-000, filed July 18, 2008 ("July 18th Filing").

[13] *Id.* at P 80 (emphasis added).

approved by FERC be found to be just and reasonable. Further, in the rulemaking, the Commission made clear that the nexus test would "ensure that incentives are not provided in circumstances where they do not materially affect investment decisions." Order No. 679-A at P 25. The point missed by CMP is that it has an obligation to show that the risks of the project are not already addressed by other aspects of its rate structure. In this case, the Commission should take into account not only the risks asserted by CMP but that the prudently incurred abandoned plant cost recovery provisions in place in the Transmission Operating Agreement ("TOA") and the existence of a formula rate, as well as the more than generous ROE already in place,[14] sufficiently address these risks.

E. CMP Incorrectly Interprets the Purpose of Section 219 of the Federal Power Act.

CMP states that section 219 of the FPA

> is specifically designed to incent companies to undertake major transmission projects, such as the [MPRP] Project, that will provide sufficient and reliable transmission capacity to meet the country's growing need for electricity, *regardless of the utility's obligations.* In passing this section of the new law, Congress concluded that, *in every region of the country*, investment in transmission was insufficient and recognized the need for incentives to ensure the necessary capital investment in energy transmission infrastructure and reliability projects in particular. In part, the legislation serves as recognition that in order for companies to make major non-routing transmission investments, there was a need for the federal government to offer incentives.

Answer at 21 (emphasis added). CMP misapprehends the purpose of section 219. Clearly, there were areas of the country in which transmission was not getting built. However, New England was not among those areas.[15] As stated in the State Parties' protest, CMP already

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[14] *See* Kivela Affidavit at PP 6-13 (appended as Attachment A to the State Parties' August 1 Protest).

[15] CMP does not cite to any source to demonstrate that New England transmission owners were not proposing and planning transmission upgrades. In fact, the opposite is true, as noted in 2004 by the Independent System Operator of New England ("ISO-NE"):

> New England currently has approximately 250 planned or proposed regulated transmission projects throughout the region, including a number of projects that have been newly identified in this year's

has an obligation to build projects identified as needed in the RSP. Therefore, the incentive could not influence CMP's investment in the Project. This investment is required by the TOA, if the project is approved by the state siting authorities. In addition, there is no language in section 219 authorizing incentive rate treatment for *every* contemplated transmission project "regardless of the utility's obligations" or finding transmission investment insufficient "in every region of the country." Finally, while section 219 provided utilities with the opportunity to seek an incentive ROE, Congress did not lose sight of the fact that the ratepayers would bear the costs of these adders. Therefore, it specifically required that incentive rates meet the just and reasonable standard.[16] It could not have anticipated that utilities would be granted inflated ROEs to build projects they were already obligated to build.

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report. Investment in these projects could be approximately $3.0 billion in New England over the next ten years. The actual amount of investment depends on the final design of each upgrade or addition.

Press Release, ISO-NE (Oct. 21, 2004), *available at* http://www.iso-ne.com/nwsiss/ pr/2004/RTEP04 _Press_Release.pdf

[16] Energy Policy Act of 2005, Pub. L. No. 109-58, § 1241, 119 Stat. 594, 961 (to be codified at 16 U.S.C. § 824s) (adding section 219(d) to the FPA, which requires that rates adjusted to include incentives be subject to the FPA's sections 205 and 206 just and reasonable standard).

III. CONCLUSION

For the foregoing reasons, the MPUC respectfully requests that the Commission:

1. grant the MPUC leave to answer CMP's August 18 Filing, which answers the State Parties' August 1 protest;

2. grant the relief requested in the State Parties' August 1 protest; and

3. grant such other relief as the Commission may deem necessary and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding either by U.S. Mail or electronic service, as appropriate. Dated at Washington, D.C., this 4th day of September, 2008.

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